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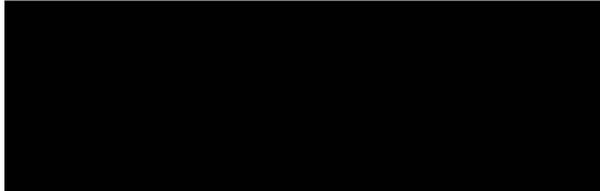
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: APR 03 2007  
EAC 02 144 52717

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

**INSTRUCTIONS:**

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the preference visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal and motion, affirming the director's decision. The matter is now before the AAO on a second motion to reopen. The motion will be granted. The previous decisions of the director and AAO will be affirmed. The petition will be denied.

The petitioner previously retained counsel to represent it in this matter. In a letter dated September 8, 2005 and submitted with the instant motion, however, the petitioner's president stated that counsel no longer represents the petitioner. All representations will be considered, but today's decision will be furnished only to the petitioner.

The petitioner is a hat manufacturer. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and it seeks to employ the beneficiary permanently in the United States as a cap and hat production supervisor. The director determined that the petitioner had not established that it has had the continuing ability to pay the proffered wage beginning on the priority date, and denied the petition accordingly. The AAO affirmed that decision, dismissing the appeal.

The record shows that the motion makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. The sole issue upon which the decision of denial, the decision on appeal, and the decision on the motion were based is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, "*Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

The regulation at 8 C.F.R. § 103.5(a)(3) states:

*Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The instant motion qualifies as a motion to reopen because the petitioner provided new evidence. The motion qualifies as a motion to reconsider because, in the motion, the petitioner asserts that the director incorrectly applied the pertinent law.

**Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are unavailable in the United States.**

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on December 24, 1997. The proffered wage as stated on the Form ETA 750 is \$27.09 per hour, which equals \$56,347.20 per year.

The petition in this matter was submitted on March 23, 2002. On the petition, the petitioner failed to state the date upon which it was established, its current number of employees, its gross annual income, and its net annual income in the spaces provided for that purpose.

On the Form ETA 750, Part B, signed by the beneficiary on December 9, 1997, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in the Bronx, New York.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.<sup>1</sup>

In the instant case the record contains (1) the petitioner's 1997, 1998, 1999, 2000, 2001 and 2002 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) 1997, 1998, 1999, 2000, 2001, 2002, 2003 and 2004 Form W-2 Wage and Tax Statements showing amounts the petitioner paid to the beneficiary during those years, (3) a letter dated March 11, 2003 from the petitioner's president, (4) earnings statements for a portion of 1997 pertinent to two employees, and (5) W-2 forms for those same two employees. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns show that it is a corporation, that it incorporated on May 1, 1984, and that it reports taxes pursuant to accrual convention accounting and the calendar year.

During 1997 the petitioner reported ordinary income of \$22,058. At the end of that year the petitioner had current assets of \$359,817 and current liabilities of \$240,380, which yields net current assets of \$119,437.

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

During 1998 the petitioner reported ordinary income of \$57,680. At the end of that year the petitioner had current assets of \$421,775 and current liabilities of \$251,050, which yields net current assets of \$170,725.

During 1999 the petitioner reported ordinary income of \$194,340. At the end of that year the petitioner had current assets of \$455,576 and current liabilities of \$226,913, which yields net current assets of \$228,663.

During 2000 the petitioner reported ordinary income of \$71,333. At the end of that year the petitioner had current assets of \$566,180 and current liabilities of \$260,010, which yields net current assets of \$306,170.

During 2001 the petitioner reported ordinary income of \$7,918. At the end of that year the petitioner had current assets of \$476,631 and current liabilities of \$378,184, which yields net current assets of \$98,447.

During 2002 the petitioner reported ordinary income of \$166,772. At the end of that year the petitioner had current assets of \$468,789 and current liabilities of \$318,734, which yields net current assets of \$150,055.

The beneficiary's W-2 forms show that the petitioner paid him \$8,216.91, \$16,679.01, \$16,857.22, \$25,563.06, \$24,147.98, \$25,795.29, \$29,011.62 and \$30,742.63 during 1997, 1998, 1999, 2000, 2001, 2002, 2003 and 2004, respectively.

The petitioner's president's March 11, 2003 letter asserted that at the time of filing the petitioner had \$39,622. The president also states that the petitioner then had two part-time workers whose 1997 wages totaled \$17,343, and whom the beneficiary would have replaced, thus freeing that additional amount toward paying the proffered wage. The petitioner's president further stated that the petitioner wishes to replace those part-time workers because, "We desperately need a full-time **cook**." [sic] [Emphasis provided.]

The president stated that those two employees' 1997 W-2 forms could not be located, so he was providing their 1998 W-2 forms. W-2 forms provided show that the employees identified as part-time cooks earned \$14,608.28 and \$24,808.47 during 1998. The petitioner's president did not provide any other evidence to corroborate his assertions.

The earnings records of those same two employees show weekly amounts paid them by checks dated from October 1, 1997 through the end of the year. Most of the checks written to one of those employees were for \$400. Most of the checks written to the other employee are for \$474. The total amount paid to the first employee during that period was \$3,887. The total amount paid to the other employee during that period was \$6,592.86. Those records do not show year-to-date totals.

The director denied the petition on February 13, 2003.

On the previous motion counsel submitted an unsigned, unattributed January 9, 2004 letter stating that the petitioner's total salary and wage expense demonstrates its continuing ability to pay the proffered wage beginning on the priority date. Counsel also noted that during most of the salient years the petitioner had a profit that exceeded the annual amount of the proffered wage.

On the instant motion the petitioner's president argues that the petitioner never intended to start the beneficiary at the proffered wage of \$27.09 per hour, but at \$8 an hour, an amount the petitioner is able to pay. The petitioner's president cites the increasing annual amounts shown on the W-2 forms submitted as evidence that the petitioner remains committed to the goal of eventually paying the beneficiary the proffered wage.

The petitioner is required to employ the beneficiary within the terms of the approved labor certification. In this case, the labor certification states that the proffered wage is \$27.09 per hour, and that is the amount the petitioner is obliged to show the ability to pay.

Showing that the petitioner paid total wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses<sup>2</sup> or otherwise increased its net income,<sup>3</sup> the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The petitioner asserts that, if it were permitted to hire the beneficiary he would replace two workers. Obviously the petitioner can only fill the positions they vacate if they are currently working in the proffered position, hat production supervisor. The petitioner did not demonstrate, nor even allege, that either of those identified workers is a supervisor.

Further, even if the petitioner had demonstrated that the wages of those two workers were available to pay the proffered wage, that proof would not suffice to make the petition approvable. As will be further explained below the two salient years during which the petitioner's income and current assets were lowest were 1997 and 2001. The petitioner demonstrated that it paid those two workers a total of \$10,479.86 during 1997.<sup>4</sup> The petitioner did not demonstrate that it paid any wages to either worker during 2001. Demonstrating that those workers wages were available to pay the wage proffered in this case would not, therefore, affect the outcome of this matter.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the

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<sup>2</sup> The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

<sup>3</sup> The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

<sup>4</sup> \$3,887 + \$6,592.86

instant case, the petitioner established that it paid the beneficiary \$8,216.91 during 1997, \$16,679.01 during 1998, \$16,857.22 during 1999, \$25,563.06 during 2000, \$24,147.98 during 2001, \$25,795.29 during 2002, \$29,011.62 during 2003, and \$30,742.63 during 2004. The petitioner must demonstrate the ability to pay the remaining balance of the annual amount of the proffered wage during each of the salient years.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). See also 8 C.F.R. § 204.5(g)(2). Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically<sup>5</sup> shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$56,347.20 per year. The priority date is December 24, 1997.

The petitioner paid the beneficiary \$8,216.91 during 1997 and must show the ability to pay the remaining \$48,130.29 balance of the proffered wage during that year. During 1997 the petitioner reported ordinary income of \$22,058. That amount is insufficient to pay the proffered wage. At the end of that year, however, the petitioner had net current assets of \$119,437. That amount is sufficient to pay the remaining balance of the annual amount of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 1997.

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<sup>5</sup> The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

The petitioner paid the beneficiary \$16,679.01 during 1998 and must show the ability to pay the remaining \$39,668.19 balance of the proffered wage during that year. During 1998 the petitioner reported ordinary income of \$57,680. That amount is sufficient to pay the remaining balance of the annual amount of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 1998.

The petitioner paid the beneficiary \$16,857.22 during 1999 and must show the ability to pay the remaining \$39,489.98 balance of the proffered wage during that year. During 1999 the petitioner reported ordinary income of \$194,340. That amount is sufficient to pay the remaining balance of the annual amount of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 1999.

The petitioner paid the beneficiary \$25,563.06 during 2000 and must show the ability to pay the remaining \$30,784.14 balance of the proffered wage during that year. During 2000 the petitioner reported ordinary income of \$71,333. That amount is sufficient to pay the remaining balance of the annual amount of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2000.

The petitioner paid the beneficiary \$24,147.98 during 2001 and must show the ability to pay the remaining \$32,199.22 balance of the proffered wage during that year. During 2001 the petitioner reported ordinary income of \$7,918. That amount is insufficient to pay the remaining balance of the annual amount of the proffered wage. At the end of that year, however, the petitioner had net current assets of \$98,447. That amount is sufficient to pay the remaining balance of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

The petitioner paid the beneficiary \$25,795.29 during 2002 and must show the ability to pay the remaining \$30,551.91 balance of the proffered wage during that year. During 2002 the petitioner reported ordinary income of \$166,722. That amount is sufficient to pay the remaining balance of the annual amount of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

The petitioner demonstrated that it paid wages to the beneficiary during 2003 and 2004, though less than the annual amount of the wage proffered in this case. Ordinarily the petitioner would be obliged to demonstrate the ability to pay the remaining balance of the proffered wage during those years.

The petition in this matter, however, was submitted on March 23, 2002. On that date the petitioner's 2003 and 2004 tax returns were unavailable. The request for evidence in this matter requested additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date, but was issued on June 21, 2002, when the petitioner's 2003 and 2004 tax returns remained unavailable. The petitioner is excused from the obligation of demonstrating its ability to pay the proffered wage during 2003, 2004, and later years.

The petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date, thus overcoming the sole basis for denial of the visa petition. The record suggests an additional issue, however, that was not addressed in the decision of denial.

The petitioner's president, in his September 1, 2005 letter, stated that the petitioner never intended to begin the beneficiary at the wage of \$29.05 per hour, but to start him at \$8 per hour, an amount significantly below the wage certified as the predominant wage in this case. Having stated that the petitioner did not intend to employ the beneficiary pursuant to the terms of the approved labor certification the petitioner is not now permitted to rely on that labor certification to support of the instant visa petition. Because that labor certification was obtained pursuant to the misrepresentation that the petitioner would employ the beneficiary at the predominant wage pursuant to the terms of the approved labor certification it is now invalid based upon the petitioner's admission that it did not and does not so intend. 20 C.F.R. § 656.30(d).

The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra* ; 8 C.F.R. § 103.3(a)(iv). Those sections do not permit AAO to consider appeals based on the lack of an approved labor certification. Therefore, today's decision may not be appealed.<sup>6</sup>

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The motion is granted. The AAO's decisions of December 10, 2003 and August 11, 2005, dismissing the appeal, are amended and affirmed. The petition is denied.

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<sup>6</sup> Typically, this office would not dismiss an appeal based on a ground other than that upon which the decision of denial was based, as this would compromise the petitioner's right of appeal pertinent to that issue. In the instant case, however, as no appeal shall lie from a denial based on the lack of an approved labor certification, dismissing the appeal, rather than remanding for denial on this other basis, abridges no substantive or procedural right.